BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-89-E
DOCKET NO. 2021-90-E

In Re:	)	
	)	
Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)	)	DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S PETITION FOR DECLARATORY ORDER
	)	

Pursuant to S.C. Code Ann. Regs. 103-825(A)(2), Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively the "Companies") submit this Petition for a declaratory ruling. In support thereof the Companies show the following:

BACKGROUND

In this petition DEC and DEP seek a declaratory ruling regarding their ability to communicate through their attorneys with witnesses during the hearing scheduled in this proceeding. The issue addressed by this petition previously arose during the hearing on the Companies' Integrated Resource Plans ("IRPs") in Dockets 2019-224-E and 2019-225-E ("IRP Proceeding"). Because the issue arose unexpectedly during the IRP Proceeding, the Companies and the other parties had no opportunity to thoroughly research or brief the issue and the Commission had little time to consider the issue. As reflected in this petition and the attached affidavits, the Companies have now had an opportunity to research the issue and consult with experts. Based on the arguments presented below, the Companies now request a ruling from the Commission in advance of the hearing in this proceeding that will clarify that certain communications between counsel and witnesses during the hearing are allowed.

The Companies seek a ruling that clarifies that it is permissible for their attorneys to consult with their witnesses privately and confidentially during the period between the direct and rebuttal testimony of those witnesses. The ruling sought by this petition would only apply: (1) where the direct and rebuttal or surrebuttal testimony is presented separately; (2) where the witness has completed direct examination, cross-examination, redirect and responded to Commissioner questions; and (3) it would apply equally to all witnesses and all parties. On July 7, 2021 the Companies submitted the rebuttal testimony of witnesses David Johnson and Glen Snider. It is anticipated that Johnson and Snider will each be called to separately provide their direct and rebuttal testimony. For the reasons set out below the Companies believe they should be allowed to communicate with these witnesses during the period between direct and rebuttal and request a declaratory ruling from the Commission confirming that right.

ARGUMENT

A. There is no rule or case law that prohibits communications between counsel and witnesses between direct and rebuttal testimony.

Research done by counsel for DEC and DEP has disclosed no rule or other authority that prohibits communications between counsel and witnesses after conclusion of direct testimony and before the witness is recalled to the stand to provide rebuttal. In addition, the Companies have consulted with experienced attorneys Costa Pleicones and Keith Babcock on the subject. Their affidavits are attached to this petition as Exhibits A and B respectively. Pleicones was admitted to the practice of law in South Carolina in 1968 and practiced law until 1991 when he became a circuit court judge. Ex. A, ¶ 2. Pleicones served as a circuit judge and Justice of the Supreme Court until December 2016 when he retired as Chief Justice and returned to private practice. Ex. A, ¶ 2. Keith Babcock is an experienced trial lawyer who has been actively trying cases in South Carolina

courts since 1977. Ex. B, ¶¶ 2, 3. Neither Pleicones nor Babcock is aware of any rule, case law or practice that would prohibit communications between counsel and witnesses during the time period between direct and rebuttal testimony. Ex. A, ¶¶ 3, 4; Ex. B, ¶ 5, 6.

Pleicones and Babcock were asked to address the applicability of Rule 30(j)(5) SCRCP which does restrict some communications during pre-trial depositions between counsel and witnesses, and which was cited by counsel for certain intervenors in the IRP Proceeding. Their affidavits provide background on the deposition practices that led to the adoption of Rule 30(j)(5), but neither Pleicones nor Babcock believe that the rule has any applicability to the communications that are the subject of this petition and both believe that the Companies have a right to consult through their attorneys with witnesses between direct and rebuttal testimony. Ex. A, ¶¶ 3, 4, 5, 6; Ex. B, ¶¶ 5, 7, 8, 9, 10.

B. Courts have recognized that the due process clause of the Fifth Amendment applies to a party's right to counsel in civil litigation.

Although counsel for the Companies have found no authority directly on the point of whether witness-counsel communications between direct and rebuttal testimony may be prohibited, there are cases that hold that a party's right to counsel in civil litigation is subject to protection under the due process clause of the Fifth Amendment to the U.S. Constitution. In *Potashnick v. Port City Construction Co*., 609 F.2d 1101 (5Th Cir. 1980) the Fifth Circuit reversed a trial court's decision to prohibit a party from consulting with his lawyer, "[r]ecognizing that a civil litigant has a constitutional right to retain hired counsel." *Id*, p. 1118. In *Mosley v. St. Louis Southwestern Railway,* 634 F.2d 942 (5th Cir. 1981), the Fifth Circuit reversed a district court decision to enforce a settlement in an administrative employment discrimination proceeding where the claimants were not permitted an opportunity to consult with an attorney before entering the

settlement. The *Moseley* decision was based on a due process right to counsel in civil and administrative litigation:

> The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process, Potashnick v. Port City Construction Co., 609 F.2d 1101, 1117-19 (5th Cir. 1980), and extends to administrative, as well as courtroom, proceedings. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). This right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights. Inasmuch as a valid settlement or waiver has an effect equal to the entry of a formal judgment, the applicability of these principles to the administrative proceeding in this case cannot be gainsaid.

Id. p. 945.

The more recent case of *Adir International v. Starr Indemnity and Liability Company*, 2021 WL 1419060 (9th Cir. 2021) described the due process right to counsel in civil cases as narrower than the 6th Amendment right to counsel in criminal cases and applying in "…cases where the government substantially interferes with a party's ability to communicate with his or her lawyer or actively prevents a party who is willing and able to obtain counsel from doing so." *Id*. p. 8. The Companies submit that a prohibition on any communications between counsel and witnesses during the time between direct and rebuttal testimony would be the type of restriction that the *Adir* court would find violative of due process.

Former Chief Justice Pleicones recognized the possibility that a restriction on communications between counsel and witnesses between direct and rebuttal testimony might violate due process requirements.

> Matters may arise during the presentation of the opponent's case requiring consultation before cross-examination of opposing witnesses, e.g. questions posed by the tribunal, which may open the door to new or unanticipated factual concerns. To deprive the lawyer and witness of the opportunity to discuss these matters places them at an unfair strategic disadvantage, in my opinion. The witness will have already been cross-examined in the case-in-chief, and will be again should she be called in rebuttal. **Aside from fairness there may well be due process and right**

> **to counsel implications if counsel and witness are prevented from consulting at this stage.**

Ex. A, ¶ 8. (Emphasis added). While the law on the right to counsel in civil litigation is less well-developed than in criminal cases, Justice Pleicones's observations emphasize the stakes involved when a party is prohibited from consulting with its lawyers.

C. The public interest will be served if witnesses appearing in this proceeding are allowed to consult with their lawyers between their direct and rebuttal testimony.

DEC and DEP submit that the public interest will be served by the declaration that they request, both because (1) the attorney-witness consultation will lead to a better presentation to the Commission and (2) the concerns that underly restrictions on communications (witness coaching and interference) don't apply to communications that take place between direct and rebuttal testimony.

1. The declaration sought by the Companies will help ensure that parties are allowed to make a better presentation to the Commission.

The benefits of allowing communications between lawyers and witnesses between direct and rebuttal are addressed in the affidavits of Babcock and Pleicones:

> 12. There are various reasons a lawyer should be able to talk with a witness, after direct testimony but before rebuttal.
> 13. For instance, witnesses who testify typically do so because they have significant factual knowledge of the controversy. In my opinion, a lawyer should not be deprived of this source of information, particularly for cross-examination of witnesses for another party.
> 14. In addition, a lawyer may need to discuss strategy questions with a witness after the direct testimony. Again, witnesses who have significant factual knowledge can be a very important source to be used in strategic decisions.

Babcock affidavit, Ex. B, ¶¶ 12, 13, 14.

> 8. Based upon my review of relevant South Carolina authority, and my experience as a lawyer and a state court judicial officer, in my opinion a lawyer has the right to confer with his witness following her direct and cross-examination regardless whether the witness may later be called in reply or rebuttal. Matters may arise during the presentation of the opponent's case requiring consultation before

> cross-examination of opposing witnesses, e.g., questions posed by the tribunal, which may open the door to new or unanticipated factual concerns. To deprive the lawyer and witness of the opportunity to discuss these matters places them at an unfair strategic disadvantage, in my opinion.

Pleicones affidavit, Ex. A, ¶ 8.

The two rebuttal witnesses who will testify for DEC and DEP in the hearing in this proceeding highlight the issue addressed in these affidavits. Snider and Johnson are key subject-matter experts for the Companies on the issues expected to be contested in this proceeding. They are exactly the kind of witnesses contemplated by the affidavits of Pleicones and Babcock when they emphasize the necessity of allowing consultation between attorneys and witnesses to consider and prepare for "new and unanticipated factual concerns" or "strategy questions" that arise during the course of a hearing. It is a fairly regular occurrence in proceedings before the Commission that an issue will arise – typically in response to a question from a Commissioner – that requires the Companies' lawyers to consult with its decision-makers before responding. Snider and Johnson have decision-making authority in their areas of expertise, and it is critical that the Companies be able to consult freely with them to the maximum extent possible.

2. The concerns that gave rise to Rule 30(j)(5) and the traditional admonishment provided by trial judges are not implicated by the ruling sought by the Companies.

In his affidavit Keith Babcock, based on his personal experience, described the abuses that gave rise to Rule 30(j)(5): "[w]hen I began practicing law, neither state courts nor the federal courts had rules like these. As a result, attorneys could coach witnesses during breaks in depositions, make speaking objections during depositions, and, quite literally, sometimes kick a deponent under the table." Ex. B, ¶ 9. Justice Pleicones describes Rule 30(j)(5) as having been adopted to address "coaching." Ex. A, ¶ 6. The witness coaching that is prohibited by Rule 30(j)(5) - which would

take place during a deposition – is not addressed by this petition which only requests a declaration regarding communications after the full competition of the witness's direct testimony.

Both Babcock and Pleicones address the traditional admonishment provided by trial judges to witnesses during a trial:

> In South Carolina, during trials, a judge normally admonishes a witness during breaks in his or her testimony that they are not to discuss the substance of their testimony during the break. However, I have never heard that admonishment at the conclusion of their testimony, even though a witness for the plaintiff might be recalled in reply.

Babcock affidavit, Ex. B, ¶ 11.

> That oversight is provided in the courtroom setting where the practice of South Carolina judges has long been to admonish counsel and the witness not to discuss the substance of the witness's testimony during recess, before the witness has concluded her testimony in the case-in-chief both on direct and cross-examination. Once the witness has concluded her testimony in the case-in-chief, I am not aware of any practice in our state courts in which a judge continues the "no consultation" admonishment.

Pleicones Affidavit, Ex. A, ¶ 7.

The declaration sought by DEC and DEP is consistent with these descriptions of traditional South Carolina trial practice. The Companies do not seek to communicate with their witnesses in a way that would violate the admonishment described by Pleicones and Babcock. Instead they seek to clarify that once their witnesses have fully concluded their direct testimony (including any cross, redirect and Commissioner questions), they should be allowed to consult through their attorneys with their witnesses prior to being recalled to provide rebuttal testimony.

CONCLUSION

As explained above and in the attached affidavits:

- there is no rule or other authority preventing the communications covered by the declaration sought by the Companies;

- a restriction on the communications described by this petition may violate due process rights of the parties; and
- the public interest will be served by issuing the declaration requested in this petition.

Accordingly, the Companies respectfully request a declaratory ruling from the Commission in advance of the hearing in this proceeding clarifying that counsel for all parties may consult with their client's witnesses during the period between full competition of direct testimony and rebuttal or surrebuttal testimony.

Submitted this 14th day of July, 2021.

Heather Shirley Smith
Deputy General Counsel
Duke Energy Carolinas, LLC
Duke Energy Progress, LLC
40 W. Broad Street, Suite 690
Greenville, South Carolina 29601
Phone: (864) 370-5045
Email: heather.smith@duke-energy.com

and

s/Frank R. Ellerbe, III
Frank R. Ellerbe, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29201
Phone: 803-929-1400
Email: fellerbe@robinsongray.com

E. Brett Breitschwerdt
MCGUIREWOODS LLP
501 Fayetteville Street, Suite 500
PO Box 27507 (27611)
Raleigh, North Carolina 27601
(919) 755-6563
Email: bbreitschwerdt@mcguirewoods.com

Attorneys for Duke Energy Carolinas, LLC
And Duke Energy Progress, LLC

EXHIBIT A

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-89-E
DOCKET NO. 2021-90-E

In Re:	)	
	)	
Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)	)	OPINION COSTA M. PLEICONES
	)	

Personally appeared before me, Costa M. Pleicones, who, being duly sworn, deposes and states:

1. I am an attorney in Columbia, South Carolina, currently serving as Special Counsel at Haynsworth, Sinkler Boyd, P.A.

2. I was admitted to the practice of law in South Carolina on October 3, 1968, and practiced in state, federal, and military courts, as well as administrative tribunals from that time until July 1, 1991, when I was elected to the state circuit court bench. I served in that capacity until March 23, 2000, when I began my service as a justice of the Supreme Court of South Carolina. I retired as Chief Justice of the state supreme court on December 31, 2016, upon reaching the mandatory retirement age.

   My practice areas over this fifty-three year period have involved civil, criminal, family and administrative law as well as judicial service in those areas. While my practice is currently concentrated in mediation and arbitration, I have continued to appear as counsel in state and federal courts since my retirement from the bench. My curriculum vitae is attached.

3. I have been engaged by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, to address the following question:

Do counsel before the Public Service Commission, have the right to consult with their witnesses following the conclusion of the witnesses' direct and cross examination, and prior to the witness testifying in rebuttal?

In my opinion the answer to this question is **YES**.

4. I am unaware of any South Carolina rule, statute or appellate decision[1] that prohibits consultation between counsel and witness in any context other than in depositions[2]. Rule 30(j)(5) SCRCP, adopted in 2000, as amended in 2001 reads as follows:

> Counsel and witness shall not engage in private off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

Rules 30(j)(6)(7) and (9) then provide enforcement mechanisms, and provide for discretionary sanctions.

5. I am not aware of a specific counterpart to Rule 30(j)(5), SCRCP, in the Federal Rules of Civil Procedure, although Local Civ. Rule 30.04(E)(D.S.C.), similarly provides:

> Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

6. While I am not aware of any specific impetus for the adoption of Rule 30(j)(5), my recollection is that it was patterned after Local Civ. Rule 30.04(E), and likely as a result of abuses by counsel within the context of depositions. Indeed, in In the Matter of

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[1] In the Matter of Anonymous Member of the South Carolina Bar, 346 SC 177, 552 S.E. 2d. 10, (2001), is the only reported South Carolina appellate decision I am aware of that specifically cites to Rule 30(j)(5), SCRCP. That decision merely affirms the efficacy of the Rule in the context of deposition conduct.

[2] Rule 43, SCRCP, entitled "Conduct of Trial" addresses a broad range of standards governing trial procedure, including Rule 43(h), "Examination of Witness". Nowhere in the Rule is there a proscription against counsel-witness consultation during trial.

Anonymous, the Court specifically called the attention of the Bar to egregious attorney misconduct during depositions[3]. In doing so, the Court observed:

> "Since depositions almost always occur without direct judicial supervision, lawyers must regulate themselves during this highly critical stage of litigation."

This observation was directed to abusive conduct, and less so to "coaching" which is the thrust of Rule 30(j)(5). It appears likely this provision was adopted simply to make deposition practices uniform in the state and federal courts. That it is confined to regulation of deposition conduct, and not to court or administrative settings, indicates a recognition that a similar proscription is not warranted where there is, in fact, judicial or administrative oversight.

7. That oversight is provided in the courtroom setting where the practice of South Carolina judges has long been to admonish counsel and the witness not to discuss the substance of the witness's testimony during recess, before the witness has concluded her testimony in the case-in-chief both on direct and cross-examination. Once the witness has concluded her testimony in the case-in-chief, I am not aware of any practice in our state courts in which a judge continues the "no consultation" admonishment.

8. Based upon my review of relevant South Carolina authority, and my experience as a lawyer and a state court judicial officer, in my opinion a lawyer has the right to confer with his witness following her direct and cross-examination regardless whether the witness may later be called in reply or rebuttal. Matters may arise during the presentation of the opponent's case requiring consultation before cross-examination of opposing witnesses, e.g., questions posed by the tribunal, which may open the door to new or unanticipated factual concerns. To deprive the lawyer and witness of the opportunity to discuss these

[3] Matter of Golden, 329 S.C. 335,496 S.E. 2d 619 (1998).

matters places them at an unfair strategic disadvantage, in my opinion. The witness will have already been cross-examined in the case-in-chief, and will be again should she be called in rebuttal. Aside from fairness there may well be due process and right to counsel implications if counsel and witness are prevented from consulting at this stage.

9. While I would never presume to predict what an appellate court might rule regarding this question, it is my opinion to a reasonable degree of professional certainty, that consultation between witness and counsel following direct and cross-examination, but before rebuttal, is not barred in South Carolina by any rule, statute or appellate decision.

Costa M. Pleicones

Sworn and Subscribed before me
On this 12th day of July, 2021

Notary Public for South Carolina
My Commission Expires: 3/15/2029

COSTA M. PLEICONES

PERSONAL:

Born February 29, 1944, Greenville, SC. Residing in Columbia, SC..

CONTACT INFORMATION:

Haynsworth Sinkler Boyd, P.A., 1201 Main Street, Columbia, SC 29201. Direct Dial: 803-540-7910. Email: cpleicones@hsblawfirm.com

EDUCATION:

- A.B., Wofford College (1965).
- J.D., University of South Carolina Law School (1968).
- Graduate, General Jurisdiction Course, National Judicial College, University of Nevada-Reno (1992).
- New York University, Appellate Judges Seminar (2000).

BAR ADMISSIONS:

- Supreme Court of South Carolina (1968).
- United States District Court for the District of South Carolina (1968).
- United States Court of Appeals for the Armed Forces (1969).
- Supreme Court of the United States (1977).
- Fourth United States Circuit Court of Appeals (1990).
- Member, South Carolina Bar.
- Member, Richland County (SC) Bar.

MILITARY:

- Active duty, as a Captain, United States Army Judge Advocate General's Corps (March 1969 - March 1973).
- Member, United States Army Reserve. Colonel - USAR, retired (March 1973 - March 1999).
- Graduate, JAGC Command and General Staff Course.
- Commander, 12th Legal Services Organization (1990 - 1993).
- Emergency Preparedness Liaison Officer for South Carolina, First United States Army (1993 - 1999).

PROFESSIONAL EXPERIENCE:

- Captain, United States Army Judge Advocate General Corps. Highest duty position: Deputy Staff Judge Advocate, Ft. Rucker, Alabama (March 1969 - March 1973).
- Chief Deputy Public Defender, Richland County (SC) (March 1973 - March 1977).
- Private Practitioner, Columbia, South Carolina in addition to public service positions (February 1975 - June 1991).
- Assistant County Attorney for Richland County (SC) (August 1977 - December 1978).
- County Attorney for Richland County (SC) (January 1979 - January 1981).
- Municipal Judge, City of Columbia, South Carolina (September 1982 - March 1988).
- Resident Circuit Court Judge, Fifth Judicial Circuit of South Carolina (July 1991 - March 2000).
- Associate Justice, The Supreme Court of South Carolina (March 2000 - 2015).
- Chief Justice, The Supreme Court of South Carolina (Elected May 27, 2015, served until December 31, 2016).
- Active Retired Judge, January 1, 2017 – March 12, 2018.
- Special Counsel, Haynsworth Sinkler Boyd, P.A. (March 13, 2018 - Present).

HONORS AND ASSOCIATIONS:

- Wofford College, Honorary Doctor of Laws Degree (2002).
- University of South Carolina, Honorary Doctor of Laws Degree and Commencement Speaker (2005).
- Charleston School of Law, Honorary Doctor of Laws Degree and Commencement Speaker (2016).
- Francis Marion University, Honorary Doctorate and Commencement Speaker (2018)
- Wofford College Board of Trustees (Elected by the South Carolina Conference of the United Methodist Church (2013 - Present).
- Permanent Member, Judicial Conference, Fourth United States Court of Appeals.
- South Carolina Commission on Indigent Defense (2017-2018)
- John W. Williams Distinguished Service Award, Richland County Bar (2016)
- Matthew J. Perry Civility Award, Richland County Bar (2013)
- Charter Member and Master of the Bench, John Belton O'Neall Chapter, American Inns of Court.
- Legion of Merit (Military Award).
- Guest Speaker, Hibernian Society of Charleston Saint Patrick's Day Banquet (2013).
- Palmetto Patriot Award (South Carolina Army National Guard).
- USAID Mission to Azerbaijan to instruct judgeship candidates on judicial ethics (2006).
- USDOJ Delegation to the Justice Academy of Turkey (Ankara and Istanbul) for presentation of American guilty plea procedures (2013).

EXHIBIT B

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-89-E
DOCKET NO. 2021-90-E

In Re:	)	
	)	
Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's 2021 Avoided Cost Proceeding Pursuant to S.C. Code Ann. Section 58-41-20(A)	)	AFFIDAVIT OF KEITH M. BABCOCK

Personally appeared before me, Keith M. Babcock, who, being duly sworn, deposes and states that:

1. I am an attorney, and I have been practicing law in South Carolina for 44 years.
2. A copy of my curriculum vitae is attached as Exhibit A.
3. My practice focuses on civil litigation. I have been trying cases since 1977, and I practice in both state and federal courts.
4. I have been asked by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to address the following question: Should an attorney practicing before the Public Service Commission be permitted to talk with a witness after their direct testimony is complete, but before their rebuttal testimony commences?
5. In my opinion, the answer to that question is yes, an attorney should be permitted to talk with a witness before the Public Service Commission after they have completed their direct testimony, but before they have begun their rebuttal testimony.
6. As a preliminary matter, I would note that I am not aware of any South Carolina case law on this issue in civil litigation generally.

7. The closest guidance are the state and federal rules concerning conduct during a deposition. In state court, Rule 30(j)(5) provides that:

> Counsel and witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

8. Local Federal District Court Rule 30.04(e) similarly provides that:

> Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

9. When I began practicing law, neither state courts nor the federal courts had rules like these. As a result, attorneys could coach witnesses during breaks in depositions, make speaking objections during depositions, and, quite literally, sometimes kick a deponent under the table.

10. The deposition procedure changed, as I recall, in the early 1990s when United States District Court Judge G. Ross Anderson, Jr. issued an order concerning deposition conduct involving cases assigned to him. His order was subsequently adopted for use by the other federal judges, in the form of a local district court rule, and was later adopted by the South Carolina Supreme Court for state court cases.

11. In South Carolina, during trials, a judge normally admonishes a witness during breaks in his or her testimony that they are not to discuss the substance of their testimony during the break. However, I have never heard that admonishment at the conclusion of their testimony, even though a witness for the plaintiff might be recalled in reply.

12. There are various reasons a lawyer should be able to talk with a witness, after direct testimony but before rebuttal.

13. For instance, witnesses who testify typically do so because they have significant factual knowledge of the controversy. In my opinion, a lawyer should not be deprived of this source of information, particularly for cross-examination of witnesses for another party.

14. In addition, a lawyer may need to discuss strategy questions with a witness after the direct testimony. Again, witnesses who have significant factual knowledge can be a very important source to be used in strategic decisions.

15. While I think there are good reasons to preclude lawyers from talking to their witnesses during their actual testimony, I do not think those same concerns apply when a witness has completed their direct testimony.

Keith M. Babcock

SWORN to before me this 12th
day of July, 2021

Connie W. Grugan
Notary Public for South Carolina
My Commission Expires: 1/12/2026

KEITH M. BABCOCK

Address and Contact

1513 Hampton Street
Columbia, SC 29201
803-771-8000 (phone)
803-733-3534 (fax)
kmb@lewisbabcock.com

Education

Princeton University, A.B., 1973

George Washington University, J.D., with honors, 1976

Employment

South Carolina Attorney General's Office
Staff Attorney, 1977–1978
State Attorney, 1978–1979

Assistant Attorney General
1979–1981

Barnes & Austin
Private Practice – 1981-1982

Austin & Lewis
Private Practice – 1982-1983

Lewis Babcock L.L.P.
1984 to present

Primary Practice Areas

Eminent domain, business and governmental disputes, and professional negligence and ethics; trial and appellate litigation in State and Federal Courts
Rated "AV® Preeminent™" by Martindale-Hubbell *Law Directory*

Bar Admissions

South Carolina, 1977
U.S. District Court, District of South Carolina, 1977
U.S. Court of Appeals, Fourth Circuit, 1977
United States Court of Federal Claims, 1979
U.S. Supreme Court, 1980
U.S. Tax Court, 1981

Professional Activities

Civil Justice Advisory Committee, District of South Carolina, 1991–1993
South Carolina Board of Law Examiners, 2001–2006
Richland County Bar Association
American Bar Association

Federal Bar Association, South Carolina Chapter
South Carolina Bar Chairman
Professional Responsibility Committee, 1985–1986
Professional Liability Committee, 2013–2015
South Carolina Association for Justice
Owners' Counsel of America
SC Chapter of the American Board of Trial Advocates,
President (2016)
Member of Advisory Committee on the Commission on Standards of Judicial Conduct, past Acting Chair 2013, 2015
Permanent Member of The Fourth Circuit Judicial Conference

Professional Publications and Presentations

- 1/18 — ALI-CLE Eminent Domain Seminar – Condemnation 101: Wanna Win? Effective Attorney-Appraiser Interaction (Panel) (Charleston, SC)
- 1/18 — ALI-CLE Eminent Domain Seminar – The Project Influence Rule and its Evidentiary Burdens (Panel) (Charleston, SC)
- 11/17, 3/13, 3/12, 3/11 — Guest Lecturer, University of South Carolina Law School, Commercial Real Estate Transactions – Eminent Domain Overview (Columbia, SC)
- 1/17 — ALI-CLE Eminent Domain Seminar – Condemnation 101: The Difference between Winning and Losing (Panel) (San Diego, CA)
- 1/15 — ALI-CLE Eminent Domain Seminar – Valuation of Temporary Construction Easements (San Francisco, CA)
- 1/15 — ALI-CLE Eminent Domain Seminar – Condemnation 101: Name That Tune: Common Trial Themes used by Condemnors and Condemnees (Panel) (San Francisco, CA)
- 2/14 — Chaired the 2014 Masters in Trial Demonstration presented by the South Carolina chapter of ABOTA (Columbia, SC)
- 1/14 — ALI-CLE Eminent Domain Seminar – Condemnation 101: How to Prepare and Present an Eminent Domain Case – The Income Approach to Value: What Makes it Tick (New Orleans, LA)
- 2/13 — Co-chaired the 2013 Masters in Trial Demonstration presented by the South Carolina chapter of ABOTA (Columbia, SC)
- 1/12 — ALI-ABA Eminent Domain Seminar – Condemnation 101: Winning the High Ground with Fundamentals of Eminent Domain Valuation and Trial Practice – What a Lawyer Should Look for When Reviewing an Appraisal in Eminent Domain (San Diego, CA)
- 2/11 — ALI-ABA Eminent Domain Seminar – Condemnation 101: Making the Complex Simple in Eminent Domain – Representing the Condemnee and Winning from the Start: Overview and Suggestions for a Case Plan (Coral Gables, FL)
- 9/09 — SC Bar / S.C. Association CPAs – Litigation Conference 2009 – Lost Profits and Economic Damages (Columbia, SC)
- 1/09 — ALI-ABA Eminent Domain Course of Study – Condemnation 101: How to Prepare and Present an Eminent Domain Case (Miami Beach, FL)

- 1/08 — ALI-ABA Eminent Domain Course of Study – Condemnation 101: Fundamentals of Condemnation Law and Land Valuation (San Francisco, CA)
- 12/07 — SC Bar (Real Estate Section) Eminent Domain CLE – Condemnation Practice (Columbia, SC)
- 9/06 — CLE International – SC Eminent Domain Conference – Environmental Issues in Condemnation Cases (North Charleston, SC)
- 2/05 — CLE International – SC Eminent Domain Conference – Public Taking for Private Gain (Charleston, SC)
- 1/05 — 22nd ALI-ABA Eminent Domain and Land Valuation Litigation Seminar – Environmental Issues and Interaction with State Environmental Agencies (Miami, FL)
- 1/02 — 19th ALI-ABA Course of Study – Eminent Domain and Land Valuation Litigation – Severance Damages (Scottsdale, AZ)

Activities

Past President of Columbia Jewish Community Center and currently serves on its Board of Directors; past member of the Board of Directors for the Columbia Jewish Federation; Co-recipient of the 2013 Columbia Israel Bonds Star of David Award; Member of the Board of Directors of Greater Columbia Educational Advancement Foundation (2007-2012).

Expert Testimony

BW&L Properties, LLC; CCC Car Wash, LLC; CCH Investments, LLC; and Chase Oil Co., Inc. vs. South Carolina Department of Transportation, Docket No. 2009-CP-21-1870
This was a right to take challenge action involving a condemnation. Testimony was provided on behalf of the condemnor as to the reasonableness of attorneys' fees sought by the Landowner.

In re: Application of South Carolina Water Services, Inc. for Approval of an Increase in Rates for Water and Sewer Services, Before the South Carolina Public Service Commission, Docket No. 2017-292–WS. Testimony provided as to reasonableness of attorneys fees in other litigation.

Selected Reported Cases

- Bennett v. Carter, 807 S.E.2d 197 (S.C. 2017)
- Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)
- In Re Mullinax, 395 S.C. 504, 722 S.E.2d 524 (2012)
- Dutch Fork Development Group, II, LLC v. SEL Properties, LLC, 753 S.E.2d 840 (S.C. 2012)
- Vortex Sports & Entertainment, Inc. v. Ware, S.E.2d 444, 447 (S.C.App 2008)
- South Carolina State Ports Authority v. Jasper County, 629 S.E.2d 624 (S.C. 2006)
- Layman v. State, 630 S.E.2d 265, (S.C. 2006)
- South Carolina Department of Highways and Public Transportation v. Manning, 323 S.E.2d 775 (S.C. 1984)
- Manning v. City of Columbia, 377 S.E.2d 335 (S.C. 1989)

- Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983)
- Rice v. South Carolina Department of Highways and Public Transportation, 289 S.E. 2d 645 (S.C. 1982)